Canada

RESTRICTIVE TRADE PRACTICES COMMISSION

[3]

REPORT

Concerning Alleged Attempts at Resale Price Maintenance in the Distribution and Sale of Gasoline in the Toronto Area

DEPARTMENT OF JUSTICE
OTTAWA

THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

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RESTRICTIVE TRADE PRACTICES COMMISSION

REPORT

CONCERNING ALLEGED ATTEMPTS AT RESALE PRICE MAINTENANCE IN THE DISTRIBUTION AND SALE OF GASOLINE IN THE TORONTO AREA

COMBINES INVESTIGATION ACT

Ottawa

1960

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THE QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1960

RESTRICTIVE TRADE PRACTICES COMMISSION

C. Rhodes Smith, Q.C., M.A., LL.B., B.C.L.,
Chairman

Pierre Carignan, Q.C., M.A., LL.L.
Member

A. S. Whiteley, B.A., M.A.,
Member

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RESTRICTIVE TRADE PRACTICES COMMISSION

OTTAWA

February 25, 1960

Honourable E. Davie Fulton, P.C., Q.C., M.P.,
Minister of Justice,
Ottawa.

Sir:

I have the honour to submit to you herewith the report of the Restrictive Trade Practices Commission dealing with alleged attempts at resale price maintenance in the distribution and sale of gasoline in the Toronto area.

The matter was brought before the Commission by the submission of a statement of the evidence obtained in the inquiry by the Director of Investigation and Research under the Combines Investigation Act and has been dealt with in accordance with the provisions of Sections 18 and 19 of the Act.

Argument on the Statement of Evidence was heard by the Commission in proceedings before Mr. C. Rhodes Smith, Chairman and Mr. A. S. Whiteley, Member of the Commission at Toronto on December 2, 1959. At these proceedings Messrs. J. J. Quinlan and A. C. Whealy appeared on behalf of the Director of Investigation and Research and Messrs. J. J. Robinette, Q.C. and J. H. C. Clarry appeared on behalf of The British American Oil Company Limited.

Mr. Pierre Carignan, Q.C., did not join the Commission until after the hearing in the inquiry and consequently took no part in the preparation of this report.

Yours faithfully,

(Sgd.) C. Rhodes Smith

C. Rhodes Smith
Chairman

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CHAPTER I

INTRODUCTION

1. Reference to the Commission

Under date of the 30th day of October, 1959 the Director of Investigation and Research under the Combines Investigation Act submitted to the Commission a statement of the evidence which he had obtained in an inquiry conducted by him. At the same time the Director submitted a copy of the Statement of Evidence to The British American Oil Company Limited, against whom allegations were made therein. In the Director's Statement and in this report The British American Oil Company Limited is sometimes referred to as "B.A. Oil" or the "Company".

2. Hearings and Witnesses

The origin of the inquiry and its conduct are described as follows in the Statement of Evidence:

"2. This inquiry was commenced by the Director of Investigation and Research, pursuant to Section 8(b) of the Act, as a result of a complaint received from the Ontario Retail Gasoline and Automotive Service Association of Toronto, Ontario.

3. The evidence obtained in this inquiry, which is incorporated by reference and summarized in the Statement, consists of:

(a) Oral evidence heard before Mr. C. Rhodes Smith, Q.C., Chairman of the Restrictive Trade Practices Commission, on July 29 and August 13, 1959 in Toronto pursuant to Section 17 of the Act. At these hearings Jack Halpert, Max Halpert and Richard de Pass, gasoline retail lessees, all in partnership, John Albert Hoyle and Alfred Miller George, District Manager, Retail, Metropolitan Toronto, and Sales Representative, respectively, of The British American Oil Company Limited, were examined.

(b) Exhibits 1 to 14, both inclusive, filed during the course of the evidence of the persons referred to in paragraph (a) and listed in Appendix I.

(c) Return of information from Messrs. Jack Halpert, Max Halpert and Richard de Pass dated October 13, 1959."

On receipt of the Statement of Evidence the Commission, in accordance with the provisions of Section 18 of the Combines Investigation Act, fixed Wednesday, the 2nd day of December, 1959, at the hour of 10 o'clock in the forenoon, in the Department of Labour Board Room, Strand Building, 91 Yonge Street, in the City of Toronto, in the Province of Ontario, as the date, time and place at which argument in support of the Statement of Evidence might be submitted by or on behalf of the Director of Investigation and Research and at which The British American Oil Company Limited would be allowed full opportunity to be heard with respect to the allegations against the Company made in the Statement of Evidence.

At the hearing the following appearances were entered:

J. J. Quinlan A. C. Whealy	- For Director of Investigation and Research
J. J. Robinette, Q.C. J. H. C. Clarry	- For The British American Oil Company Limited

No witnesses were examined at the hearing before the Commission.

3. Allegations Contained in the Statement of Evidence

The concluding section of the Director's Statement contains the following summary and allegations:

"38. The evidence obtained in this inquiry discloses that from time to time during the extence of retail gasoline 'price wars' in the Toronto area it has been the policy of B.A. Oil to grant temporary competitive allowances off its basic tank wagon price to its retail dealers to enable them to meet the prices of competing retail gasoline dealers. In granting the T.C.A.*, the Company at least frequently

* Temporary competitive allowance.

names or suggests a maximum retail selling price. Although temporary competitive allowances normally are granted only when there are 'price wars', they have, on at least one occasion, (July 20 to August 13, 1959) been continued even after the 'price war' had modified to the extent that, for all practical purposes, the Company considered it as having ended, and the practice of naming or suggesting a maximum resale price was continued. In period other than 'price war' periods when no temporary competitive allowance was granted, the Company did not name or suggest either minimum or maximum resale prices.

39. During 'price wars' it was the practice of some retailers to display price signs showing the selling price of gasoline on their premises, and no objection was taken by B.A. Oil to this practice, although its service station leases provided that 'the Tenant will not erect or permit to be erected or to remain on the said premises any . . . signs [other than advertising signs erected and maintained by B.A. Oil] or advertising except with the written consent of B.A.'. Usually these price signs were removed by the service station lessees, either voluntarily or on the request or instructions of B.A. Oil, at the termination of a 'price war'. The evidence discloses no objection by B.A. Oil to signs other than gasoline price signs in either 'price war' or non-'price war' periods.

40. In at least part of the month of July 1959 and until approximately July 20 there was a retail gasoline 'price war' in the Toronto area during which temporary competitive allowances were granted by B.A. Oil. The retail price of B.A. 88 gasoline dropped to as low as 30.9 cents per gallon and gasoline price signs were displayed by some of the Company's lessee dealers including Messrs. J. Halpert or R. de Pass at the Queen Street station or Fleet and Jarvis station. On or about July 20 it was considered by B.A. Oil representatives that the 'price war' had modified to such an extent that they considered it was over. Instructions were thereupon issued by Mr. J. A. Hoyle for transmission to the retail dealers through the Company salesmen that gasoline price signs on service station premises were to be removed. At or about the same time the temporary competitive allowance granted by the Company was reduced to 1.9 cents per gallon on B.A. 88 gasoline, the retail price suggested by or on behalf of the Company being changed to 39.9 cents per gallon. From July 21 to July 23, both inclusive, the retail selling prices of B.A. Velvet 98 and B.A. 88 gasoline at the Queen Street, Fleet and Jarvis and Sunnyside stations were 44.9 cents and 39.9 cents per gallon respectively. On the morning of July 24 the prices at all three stations were reduced to 43.9 cents

and 38.9 cents per gallon respectively and signs advertising these prices also were displayed at the stations. Shortly thereafter Mr. Hoyle telephoned Mr. de Pass and, according to Mr. de Pass, asked him at what prices he was selling, and, later the same morning, A. M. George called at the Jarvis and Fleet station and insisted that the price signs be removed but Mr. de Pass, the operator, refused. In any event, within a matter of hours on the same day, notices of cancellation of leases in respect of both the Queen Street and Jarvis and Fleet stations were prepared by Mr. J. A. Hoyle, the former being delivered to Mr. de Pass immediately and that for the latter being delivered the following day. No notice of cancellation of lease was delivered with respect to the Sunnyside station, the General Counsel of B.A. Oil stating the reason was that since there was no contractual relationship with Max Halpert, the lessee of the station, the Company was not sure of its rights but that the matter of termination of the lease is under active consideration by the law department of the Company (Evidence, page 94).

41. While no reason for the cancellations of the leases were given in the Notices, Mr. Hoyle stated that they were given because the signs were not removed when ordered and no other factors were involved. On the other hand, Mr. de Pass stated that the reasons indicated to him on the morning of July 24 shortly before the cancellation, in addition to the question of display of gasoline price signs, were the unsatisfactory operation of his service station and the fact that he was not operating the service station leased to him.

42. The effect of display of gasoline price signs on July 24 by the three stations in the circumstances hereinbefore mentioned would have been to place them in a more advantageous position vis-a-vis competing stations and, in the opinion of B.A. Oil representatives, might have started another 'price war'. Had the direction by B.A. Oil representatives to remove these signs been complied with, it no longer would have been feasible for the operators of these stations to continue to sell gasoline at the reduced prices.

43. In the light of the foregoing, the actions taken by B.A. Oil representatives in threatening to cancel and cancelling the leases for the Queen Street and Fleet and Jarvis stations because the operators or lessees refused to remove the signs advertising reduced prices constituted an attempt to induce the maintenance of resale prices. Bearing in mind the substantial capital investment which the three partners had in their service stations and which they stood to lose in part as well as their businesses, it is readily apparent that the cancellation

of the leases or the threat was an extremely serious matter to them.

44. It is alleged that on or about July 24, 1959 The British American Oil Company Limited, being a dealer within the meaning of Section 34 of the Combines Investigation Act, directly or indirectly by agreement, threat, promise or any other means, did attempt to require or induce Jack Halpert, Max Halpert and Richard de Pass to resell B.A. 88 gasoline at a price specified by the said The British American Oil Company Limited.

45. It is further alleged that on or about July 24, 1959 The British American Oil Company Limited, being a dealer within the meaning of Section 34 of the said Act, directly or indirectly by agreement, threat, promise or any other means, did attempt to require or induce Jack Halpert, Max Halpert and Richard de Pass to resell B.A. 88 gasoline at a price not less than a minimum price specified by the said The British American Oil Company Limited."

4. Position Taken with Respect to Allegations on Behalf of The British American Oil Company Limited

At the beginning of his argument before the Commission counsel for the Company indicated the position being taken, which may be summarized as follows:

1. The British American Oil Company at no time specified a price, or a minimum price. Under Section 34 of the Combines Investigation Act which prohibits certain practices of resale price maintenance, there is no offence unless a price or a minimum price is specified at which the sale is to be made by the purchaser. The Oxford English Dictionary defines the verb to "specify" as "to name definitely or explicitly" or "to set down categorically or particularly". In the instant case there was no specification or definite naming or explicit mentioning or setting down categorically or particularly of any price at which the retailer should sell.

2. The price of 39.9 cents per gallon was the price at which, shortly prior to July 24, 1959, retail gasoline prices in the Toronto area had become stabilized by purely competitive forces and was not a price specified by the Company.

3. The Company, as owner of the service station land, has a perfect right to insist that its stations shall be attractive and dignified. The clause in the service station lease regarding signs is

placed there for a purpose. The presence of large price signs detracts from the dignity and attractiveness of the service station and destroys the atmosphere the Company seeks to maintain.

4. The temporary competitive allowance of 1.9 cents per gallon being paid at the relevant date was paid if the gasoline was sold by the retailer at 39.9 cents or less than that. There is no compulsion by the giving of an allowance on the retailer to sell at 39.9 cents because the allowance is paid on the dealer's request if he sells at 39.9 cents or less.

5. The real purpose of these tenants of the Company in putting up the price signs to which objection was taken by the Company was not to get a lower price for the benefit of the public; but, as they themselves admit, it was designed to create confusion and renew the strife which had existed in the gasoline trade in Toronto. They were trying to secure for themselves -- not for the public -- a greater margin or allowance of profit. There was no real advantage to these tenants in putting the signs up, if their purpose was to get more volume, because other retailers would have quickly met the situation by reducing their prices competitively and thus preventing any gain in volume by the initiator of the price reduction. It is also the case that the service station operators' association took the view that price signs should be removed once the price was stabilized.

6. The evidence is clear that the Company took no objection to the tenants selling gasoline for less than 39.9 cents. The only objection was to the placing of obnoxious-looking signs advertising the price. The Company took no objection to a price of less than 39.9 cents being placed on the pumps or to sales being made at less than 39.9 cents.

CHAPTER II

RELATIONSHIP BETWEEN THE BRITISH AMERICAN OIL COMPANY LIMITED AND MESSRS. JACK HALPERT, MAX HALPERT AND RICHARD de PASS

The Statement of Evidence contains the following description of the business relationship between The British American Oil Company Limited and the three service station operators, lessees of the Company:

> "4. In his evidence (pages 3 and 11) Mr. J. Halpert stated that Messrs. Max Halpert, Richard de Pass and he were equal partners* in three service stations in the Toronto area engaged, *inter alia*, in the retail sale of gasoline, which they operated as lessees. These stations were located at 929 Queen Street East (hereinafter sometimes referred to as the Queen Street station), the corner of Fleet and Jarvis Street (hereinafter sometimes referred to as the Fleet and Jarvis station) and at the Sunnyside Motor Hotel (hereinafter sometimes referred to as the Sunnyside station) all in the City of Toronto.
>
> 5. The Queen Street station is leased by The British American Oil Company Limited (hereinafter sometimes referred to as B.A. Oil or the Company) to Richard de Pass and operated by Jack Halpert. The station went into operation in December 1958 and the lease was dated February 6, 1959 (Exhibit 2). The Fleet and Jarvis station is leased by B.A. Oil to Jack Halpert and operated by Richard de Pass. The station went into operation in 1954 and the lease under which it was operated at the time the inquiry was commenced was dated February 6, 1959 (Exhibit 1).
>
> 6. The Sunnyside station is operated by Mr. M. Halpert under a lease from the Sunnyside Motor Hotel. The Sunnyside Motor Hotel holds the station under the following arrangements: B.A. Oil owns a large block of land which, in 1951, was leased for twenty-one years to Sunnyside Motor Hotel on which to build a motel and service station. The

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* The return of information obtained from them states that the partnership is incorporated under the name of Rijamax Motors Ltd.

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Sunnyside Motor Hotel leased back, effective the same day, to B.A. Oil that portion of the land allocated to the service station for a period of twenty-one years less a day. B.A. Oil then erected a station and re-leased it to Sunnyside Motor Hotel on the same basis as those stations referred to in paragraph 5. Sunnyside Motor Hotel then sublet its interest to Max Halpert. The present lease from Sunnyside to Max Halpert was executed in 1957 for a four-year period with an option to renew for another four years (Evidence, pages 92-94).

7. Section 4 of the Equipment Loan and Retail Dealer Sales Agreement between B.A. Oil and the lessee of the Queen Street station and between B.A. Oil and the lessee of the Fleet and Jarvis station (Exhibits 1 and 2) provides, inter alia, that 'no petroleum products other than those of the Company will be used, stored, sold or otherwise dealt in, on or about the above-named premises or any other premises leased, owned or controlled by the Dealer within one mile of the said premises,'. In his evidence (pages 8-9) Mr. Jack Halpert stated that except for one occasion all gasoline requirements had been purchased from B.A. Oil. While Mr. Max Halpert was certain that his lease relating to the Sunnyside station did not require use of B.A. Oil products, he stated that as a matter of practice he had always purchased his requirements from B.A. Oil.

8. The return of information obtained from Messrs. Jack Halpert, Max Halpert and Richard de Pass discloses that they have a substantial capital investment in the Queen Street, Fleet and Jarvis and Sunnyside stations. The capital investment as at July 24, 1959 in each of these stations was approximately $9,479, $15,553 and $12,421 respectively, or a total of $37,453, of which approximately 28 per cent is accounted for by shelf stock, that is, items with a frequent turnover, being mainly tires, tubes, anti-freeze, batteries and similar products, the balance of 72 per cent being made up of equipment except for an item of $1,000 prepaid rent which is maintained with respect to the Sunnyside station."

CHAPTER III

THE SITUATION IN THE RETAIL GASOLINE TRADE IN THE TORONTO AREA AND THE POLICY OF TEMPORARY COMPETITIVE ALLOWANCES

1. Granting of Temporary Competitive Allowances during "Price Wars"

The conditions existing in the retail gasoline trade in 1958 and 1959 are described in the Statement of Evidence as follows:

"9. The price of gasoline to the dealer charged by B.A. Oil is called the tank wagon price. The Province of Ontario is divided into districts, and the districts into zones. Each zone has a tank wagon price which may, or may not, be the same as other zones. Metropolitan Toronto is all within a single zone so far as tank wagon price is concerned. Tank wagon prices are subject to relatively little fluctuation, and, within the Toronto area, the tank wagon price has remained constant for several months prior to July 1959 (Evidence, pages 52-54).

10. From time to time in 1958 and 1959 so-called 'price wars' have occurred in the retail distribution of gasoline in the Toronto area. During these 'price wars' B.A. Oil has from time to time assisted its retail dealers in meeting reduced prices of other dealers by granting temporary competitive allowances (hereinafter sometimes referred to as T.C.A.) to individual dealers or to all its dealers in the Toronto area. The granting of T.C.A. does not involve a change in the basic tank wagon price at which the dealers purchase gasoline but is a special temporary allowance off the tank wagon price so that, in effect, the dealer's purchase price is less than the basic tank wagon price. The amount of this allowance varies depending upon circumstances, and, in his evidence, Mr. J. A. Hoyle believed that in July 1959 it went as high as 9.4 cents per gallon, although he could not be sure (Evidence, page 61). The basis on which T.C.A. was granted was described by Mr. Hoyle in his evidence as follows:

'Q. And on what occasions are temporary competitive allowances granted?

A. A temporary competitive allowance is granted by our company upon written request of a dealer because of deteriorating retail prices in his area which, if he were to pay the full tank wagon price, would not enable him to remain in business at a profit, and thereby put him out of business.

Q. You say that it is granted on the written request of a dealer, is that correct?

A. Yes.

Q. And when it is granted is it granted only to that particular dealer?

A. Yes.

Q. Have you on any occasions had temporary competitive allowances which were in effect over the whole of the City of Toronto?

A. Have we had temporary competitive allowances? - - -

Q. Yes?

A. Yes, we have.

. . .' "

(Evidence, pp. 56-57)

"11. In his evidence Mr. Hoyle did not specifically state that the T.C.A. was granted upon the condition that the dealer would not sell above a certain price named by the Company but his evidence does indicate that at such times a retail selling price was suggested to the dealer (Evidence, pages 70, 82-84). On the other hand, Mr. A. M. George in his evidence with respect to a possible telephone conversation with Mr. Jack Halpert on July 20 or 21, 1959, of which he had no specific recollection, stated that he would not have suggested a resale price but rather would have indicated the competitive price in the territory, advising that the T.C.A. was being adjusted to enable Mr. Halpert to meet that price and would not have indicated that the T.C.A. was conditional upon Mr. Halpert selling at a suggested resale price. While Mr. George did not specifically recall speaking directly to Mr.

Jack Halpert on this occasion, he did recall a telephone conversation with someone at the service station at that time (Evidence, pages 98-99)."

There is some conflict between the evidence of Company officials and the service station operators on the points whether it was necessary for the dealer to request the temporary competitive allowance on each occasion and whether a resale price would be named by the Company as a basis for the allowance. Part of Mr. Jack Halpert's evidence is as follows:

"MR. WHEALY: . . . Does B.A. Oil charge you a price which varies directly with the retail price at which you sell?

MR. JACK HALPERT: No; they set a price to us, and then we charge accordingly. We are on the standard tank wagon price.

MR. WHEALY: That is 35.9 cents?

MR. JACK HALPERT: Yes, that is right.

MR. WHEALY: During a price war, is this same condition true?

MR. JACK HALPERT: No; if we set our price at a price higher than that which they set, we would not apply for a subsidy.

MR. WHEALY: You would not apply, or would not get it?

MR. JACK HALPERT: We would not get it, I should say. If we are at the same price, or lower, we are told that we will still get the subsidy."

(Evidence, pp. 45-46)

2. Policy of The British American Oil Company Limited Regarding Price Signs on Service Station Premises

The Statement of Evidence reviews the evidence obtained in the inquiry under the above heading from which the following parts are taken:

"27. The normal B.A. Oil service station lease which is in use with respect to all service stations leased by the Company in the Toronto area, including the leases with J. Halpert and R. de Pass (Exhibits 1, 2 and 12) contains the following provision with respect to signs:

'10. B.A. may erect and maintain such advertising signs on the demised premises as it deems advisable and the Tenant will not erect or permit to be erected or to remain on the said premises any other signs or advertising except with the written consent of B.A.'

28. The evidence shows that in normal or non-'price war' periods B.A. Oil opposed the use of signs advertising the price of gasoline on B.A. Oil service station premises and refused to permit any such price advertisements other than those appearing on the pumps. This objection did not appear to have extended to other types of signs nor to signs advertising prices of products other than gasoline. The use of gasoline price signs during 'price wars' was not objected to or at least was condoned by the Company.

29. The evidence of Messrs. J. Halpert, M. Halpert and R. de Pass with respect to use of gasoline price and other signs on the premises of the Queen Street, Fleet and Jarvis and Sunnyside stations, and the action or lack of action by B.A. Oil in respect of such signs, is as follows:

'MR. WHEALY: Apart from the conditions which prevailed during the period we have been discussing -- that is, July 24 -- had B.A. Oil, as a normal practice, objected to or supervised the erection of signs or advertising on the premises?

MR. JACK HALPERT: As a rule, no. I have a sign in front of 929 Queen Street, since I have been there, which says that we do tune-ups, and things of that kind. They have never once asked me to remove the sign.

MR. WHEALY: And would this be true of the station at Jarvis and Fleet Streets?

MR. de PASS: Yes; when we first opened it we had signs relating to the same thing we have at 929 Queen Street.

THE CHAIRMAN: And this is your experience, too?

MR. MAX HALPERT: Yes; we have the same thing. A long time ago we had the same sign up there, and nobody ever objected to our using it. They are also 8 by 4 signs.

. . . ' "

(Evidence, p. 26)

At one point in his evidence, Mr. Jack Halpert was asked if price signs are displayed when there is no price war. His evidence was:

> "MR. JACK HALPERT: No, not on gasoline. We never advertise the price of gasoline, except in the event of a price war."
>
> (Evidence, p. 28)

Apart from the service stations at 929 Queen Street East and Fleet and Jarvis Streets, which are the stations involved in the present inquiry, Mr. J. A. Hoyle of The British American Oil Company Limited could not recall any other instances where the Company had cancelled the lease of an operator because he displayed signs which were not approved by the Company. Mr. Hoyle went on to say that on previous occasions when the Company had asked operators to remove unauthorized signs they had so complied (Evidence, pp. 75-76).

3. Action Taken by The British American Oil Company Limited When Price Signs Not Removed on July 24, 1959

The sequence of events leading to the cancellation of leases for the service stations at 929 Queen Street East and Fleet and Jarvis Streets is clearly shown by the evidence which is reviewed in the Statement of Evidence as follows:

> "14. The month of July 1959 was one of the periods in which there was a 'price war' in the Toronto area and the T.C.A. granted by B.A. Oil to its dealers prior to July 20 is known to have been as high as 7.4 cents per gallon on regular or standard (B.A. 88) gasoline (Exhibit 5) and possibly higher. The amount of the T.C.A. on premium (B.A. Velvet 98) gasoline at this time is not in evidence. On or about July 20 the 'price war' modified considerably and the T.C.A. on B.A. 88 gasoline was reduced to 1.9 cents per gallon throughout the Toronto area, the suggested retail price being 39.9 cents per gallon. Exhibit 6 shows that on July 24 the T.C.A. on B.A. Velvet 98 gasoline was 2.4 cents per gallon and in his evidence Mr. Jack Halpert stated that the suggested retail price was 44.9 cents per gallon (Evidence, pages 12-13). During the period July 21 to July 23 the retail prices at the Queen Street, Fleet and Jarvis and Sunnyside stations for regular and premium grades were 39.9 cents and 44.9 cents

per gallon respectively. On the early morning of July 24 the partners, Messrs. J. Halpert, M. Halpert and R. de Pass displayed signs on the premises of the respective stations they were operating, showing the retail prices of regular and premium gasoline as 38.9 cents and 43.9 cents per gallon respectively. Later the same morning a letter cancelling the lease of the Queen Street station, dated July 24, 1959, from J. Hoyle, Manager, Retail Sales, Metropolitan Toronto, to Mr. R. de Pass was delivered to Mr. de Pass by Mr. Hoyle, accompanied by Mr. George. This letter, which contained no reasons for the cancellation, reads as follows:

> 'Re: Lease of 929 Queen St. E. Service Station
> Dated February 6, 1959
>
> The lease covering the service station property at 929 Queen St. E., dated February 6, 1959, contains the following clause:
>
> "6. It is expressly understood and agreed that B/A shall have the right to terminate this lease or any renewal thereof at any time and to enter into possession upon giving the Tenant thirty (30) days notice in writing delivered to him personally or left on the said premises, notwithstanding anything to the contrary contained in this lease or in any Retail Dealer Sales Agreement or in any other agreement between B/A and the Tenant, but in the event of such notice being given during a period for which the rent as hereinbefore provided shall have been paid, there shall be refunded to The Tenant the part of such rent corresponding with the period covered by such rent but not enjoyed by the Tenant; and the Tenant agrees that he will have no claim for damages upon exercise by B/A of such right, any and all claims being hereby expressly waived."
>
> Kindly take notice, therefore, that we will require you to vacate the above premises on August 24, 1959.
>
> Our representative, Mr. A. M. George, will attend to receive possession on that date.'

(Exhibit 10)

A letter dated July 24, 1959 from Mr. Hoyle to J. Halpert relating to the Fleet and Jarvis station (Exhibit 11), which was in identical language to the foregoing letter, was delivered to Mr. Halpert by Mr. George on July 25, as he had been

unable to deliver it on July 24 because Mr. Halpert apparently was not at the service station when Mr. George had called (Evidence, pages 102-103). Mr. Hoyle stated that the letter to Mr. de Pass (Exhibit 10) was prepared following a telephone conversation with Mr. de Pass earlier on July 24 . . . (Evidence, page 87). "

The evidence in the inquiry indicates that on July 20, 1959 salesmen of B.A. Oil were instructed by Mr. J. A. Hoyle that all price signs would be removed from the Company's retail service stations in Toronto, and that at that time signs were removed from the three service stations operated by Messrs. Jack Halpert, Max Halpert and Richard de Pass. It was the re-installing of signs, as described above, on the morning of July 24, 1959 to which the Company objected. Mr. Hoyle stated the objections to the signs as follows in his evidence:

"Q. What was the objection to the signs which were being displayed?

A. We had completed a period of several months which involved a price situation in Toronto, at which time most service stations had various types of signs displayed, which not only degraded the general appearance of the service station, but they on many occasions had resulted in complaints from neighbourhood people, and had resulted in complaints from customers regarding the general degrading condition. And it was as a result of that, coupled with the fact that the Retail Dealers Association had requested that all price signs be removed, that our company issued the order.

Q. And when you say that your company issued the order, did the company issue a general order, or are you speaking of this specific instance?

A. I do not follow your question.

Q. You said, 'our company issued an order'; what order do you refer to? Did B.A. issue a general order that all signs were to come down?

A. It was a general order issued by myself in Toronto that all price signs would be removed.

Q. What date was that order issued?

A. That order -- may I look at my calendar?

Q. Yes?

A. That order went out to our salesmen on July 20.

Q. On July 20?

A. And it is quite conceivable that some of our salesmen did not receive the message until July 21.

Q. Was any direct notification sent to the dealers?

A. Through the salesmen, yes.

Q. Well, the situation was that you were relying upon salesmen to notify the individual dealers?

A. Yes.

Q. So that no written notification went out from head office to the dealers?

A. No, that is right.

Q. And I think you said earlier in your evidence that signs had been placed on previous occasions, but you did not object to them?

A. Due to the competitive situation at the time, those signs were condoned, yes.

Q. And what was different about the competitive situation at this time, that the signs could not be condoned?

A. The general terminology of a price [war?] was no longer existing at this particular time.

Q. You say that the price war was over?

A. Yes."

(Evidence, pp. 77-79)

There are some differences in the evidence of Messrs. J. Halpert and R. de Pass and that of Messrs. Hoyle and George with respect to some details of what transpired on July 24 and 25 and, particularly, as to whether any reasons were given for the cancellation of leases in addition to the reason that the price signs were not removed. It does not appear necessary to explore these differences because, in the opinion of the Commission, the essential aspect for the

purposes of this inquiry is the question of the price signs, in regard to which the evidence is generally consistent.

On the morning of July 24, 1959 Messrs. Jack Halpert, Max Halpert and R. de Pass posted signs at the three service stations which they operated, advertising gasoline at prices one cent lower than the prices which had prevailed on the previous day. Mr. R. de Pass was telephoned by Mr. Hoyle of The British American Oil Company Limited on the morning of July 24 and, according to the evidence of Mr. Hoyle, Mr. de Pass was instructed to have the signs removed. Mr. Hoyle went on in his evidence:

"A. And I also suggested to him that if the signs were not removed it would be necessary for us to become a little more demanding, to see that they were removed."

(Evidence, p. 70)

Following the telephone call by Mr. Hoyle, Mr. George, a Sales Representative of the Company, went to the service station at Fleet and Jarvis Streets. Mr. George's evidence includes the following:

"A. And I told him that those signs were unauthorized.

Q. Yes?

A. And that I wanted them removed right away.

Q. And, as I understand it, you did that on your own initiative?

A. Yes.

Q. What did Mr. de Pass say to you, or what did he indicate that he would do?

A. He indicated to me that there was nothing he could do about it.

Q. What did you do then?

A. I carried on with some normal business that I had with him, and I left the station and phoned Mr. Hoyle and reported the situation that existed and what I had done about it."

(Evidence, pp. 100-01)

The evidence of Mr. de Pass in regard to the visit of Mr. George includes the following:

> "MR. de PASS: . . . Mr. George said to me on his visit that he did not care what price we sell gasoline for; all he asked me to do was that I remove the price signs."
>
> (Evidence, p. 23)

The cancellation of the leases of the service stations at 929 Queen Street East and at the corner of Fleet and Jarvis Streets then followed, as described in the portions of the Statement of Evidence previously quoted.

CHAPTER IV

SIGNIFICANCE OF PRICE SIGNS IN THE RETAIL SALE OF GASOLINE

It will be recalled from the evidence of Mr. Jack Halpert, quoted earlier, that he stated that so far as the partners were concerned the price of gasoline was never advertised, "except in the event of a price war".

It is not clear from the evidence in the inquiry just what constitutes a "price war" as distinct from differing retail prices among service stations. At one point in his evidence Mr. Jack Halpert stated:

> "Let me answer it this way, that before the price war started last year there was never any retail price set by anyone. One station was charging 42.9 and another $43\frac{1}{2}$, and another something else. There were various prices throughout the city."
>
> (Evidence, p. 47)

The price change advertised by Messrs. J. Halpert, Max Halpert and R. de Pass on July 24, 1959 was a reduction of one cent per gallon from the price which had prevailed on the previous day.

Mr. Hoyle's evidence in regard to the possible results of the display of a price sign by one gasoline retailer contains the following:

"Q. Does your experience enable you to comment on the effect on the sale, in gallons, by a service station that displays a sign -- let us assume that it is a sign cutting a price?

A. Yes. Generally this gives a man a competitive edge, which normally is of short duration.

Q. During this duration he may be expected to sell larger quantities of gasoline, is that so?

A. Yes.

Q. And why is it of short duration?

A. Because invariably his competitor, whoever he may be, will meet him. The advantage is then lost. And the man actually brings ruination upon himself. He no longer can pay his bills.

Q. Again dwelling on your experience, in your opinion would a sign displayed on the service station, let us say, of Fleet and Jarvis Streets, showing a reduction of one cent in the resale price of gasoline, have led to another price war?

A. I don't know whether it would or not; it is possible that it could have.

Q. You expressed the opinion a moment ago that any competitive advantage would be of short duration because others would meet it?

A. Yes.

Q. Would that be the likely result in this case, if the sign had remained up?

A. It is possible.

Q. And is that as far as you are prepared to go?

A. Yes."

(Evidence, pp. 80-81)

Mr. R. de Pass said in evidence that the effect of advertising a reduction of one cent per gallon in the price of gasoline on July 24, 1959 had been to increase the volume of his sales, which had been about 500 to 600 gallons a day, to about 2,500 gallons (Evidence, p. 22). His evidence also contains the following:

"MR. WHEALY: Would you have been able to sell as much gasoline if you had taken the signs in?

MR. de PASS: Definitely not.

MR. WHEALY: So that the effect of taking the signs in would be either to lower your volume of gasoline sold, and therefore your profit, or, I suppose, force you back up to 39.9?

MR. de PASS: Yes.

MR. WHEALY: Could you, at 600 gallons a day, afford to sell gasoline at 38.9 cents?

MR. de PASS: No; I could, perhaps, for a period of time; but it would only be a matter of time before I would go bankrupt.

MR. WHEALY: Can you afford to sell gasoline at 39.9, if you get your normal volume of gasoline?

THE CHAIRMAN: What do you mean by 'normal'? What is 'normal' volume?

MR. de PASS: 600 gallons a day, do you mean?

MR. WHEALY: Yes.

MR. de PASS: I could make a profit, -- I imagine I could pay expenses. But I, personally, would have to suffer.

MR. WHEALY: What I am trying to get at is whether or not the effect of the price sign was to enable you to take a lesser profit on a larger volume, and therefore make a greater net return?

MR. de PASS: That is correct.

MR. WHEALY: Or whether the net result would have been the same, whether the price sign had been there or not?

MR. de PASS: No; when we put out the price sign we intended specifically to increase our volume and, of course, make more money with the higher volume. By the same token, we felt that it would create enough disturbance among the other neighbouring service stations that we were convinced would have stepped in and done something to give us back our normal mark-up on gasoline, which is 8.6 cents a gallon, before the price war.

THE CHAIRMAN: At 39.9, what was it?

MR. de PASS: 6.5 cents a gallon.

MR. WHEALY: Let me ask this question: were you making more profit at 38.9 cents with 2,600 gallons a day than you would have had at 39.9 cents with 600 gallons a day volume?

MR. de PASS: Yes.

THE CHAIRMAN: More net profit?

MR. de PASS: More net profit.

THE CHAIRMAN: Obviously make more gross profit?

MR. de PASS: More net profit, yes.

MR. WHEALY: Would it be accurate to say that, had you been forced to take in your price sign, you would either have lost net profit or been forced to raise your price?

MR. de PASS: I would have lost net profit and at the same time it would not have been practical for me to sell gasoline at 38.9.

THE CHAIRMAN: So that the other alternative would be what?

MR. de PASS: To go back up to their price of 39.9."

(Evidence, pp. 23-25)

It will be noted that Mr. de Pass's evidence, quoted above, that the objective in advertising a reduction in the price of gasoline on July 24 was stated to have been two-fold: first, to increase the volume of gasoline sales so that a larger over-all profit would be secured and, secondly, to create disturbance in the retail gasoline trade in the expectation that something would be done to re-establish a markup of 8.6 cents per gallon of gasoline instead of the margin of 6.5 cents then prevailing.

The evidence of Mr. George, Sales Representative of The British American Oil Company Limited, contains the following:

"Q. In your experience, would the posting of a sign showing a cut price for gasoline attract business to a station displaying such a sign?

A. This could vary, according to what is posted in the way of signs at competitive service stations in the area. I would say that when other service stations have competitive signs out, that there is no appreciable difference in the gallonage of a service station. But if one service station alone has a sign out, displaying a price, then I would say, yes, that it does have a

bearing on the gallonage at that service station.

Q. And what bearing does it have; what is the effect?

A. It has the effect of drawing the public into that service station to buy gasoline at what the public might feel to be a cheaper price than the service station down the street has.

If I might enlarge upon that further, I might say that even a price sign -- and this is my own opinion -- a price sign which is posted at a service station, even though it shows the prevailing price within the general area, it still has the effect, perhaps, of bringing people in where they might not go to the next service station.

Q. Do you know of any other practical way for a service station operator to advertise the prices at which he is selling gasoline, besides displaying signs?

A. Yes. He could do it by means of hand-bills in parking lots near his service station. That is one example.

Q. In your experiences, if you are able to speak about this are the media of radio, television and newspapers used to advertise the prices of gasoline?

A. Not the prices of gasoline, no.

Q. It is not practical?

A. Not to my knowledge; I would not say that it is general practice."

(Evidence, pp. 104-05)

CHAPTER V

APPRAISAL OF THE ACTIONS OF THE BRITISH AMERICAN OIL COMPANY LIMITED

1. Legislation Affecting Resale Price Maintenance

Legislation affecting the practice of resale price maintenance was enacted at the Second Session of the Parliament of Canada in 1951, following and in accordance with the recommendations made in an interim report on this subject by the Committee to Study Combines Legislation submitted in October, 1951.

By Section 11 of Chapter 30 of the Statutes of Canada, 1951 (2nd Session) a new Section 37A was added to the Combines Investigation Act, which Section 37A was renumbered as Section 34 by Section 4 of Chapter 39 of the Statutes of Canada, 1952. This Section, which came into force on December 29, 1951, enacts as follows:

> "34. (1) In this section 'dealer' means a person engaged in the business of manufacturing or supplying or selling any article or commodity.
>
> (2) No dealer shall directly or indirectly by agreement, threat, promise or any other means whatsoever require or induce or attempt to require or induce any other person to resell an article or commodity
>
> (a) at a price specified by the dealer or established by agreement,
>
> (b) at a price not less than a minimum price specified by the dealer or established by agreement,
>
> (c) at a markup or discount specified by the dealer or established by agreement,
>
> (d) at a markup not less than a minimum markup specified by the dealer or established by agreement, or
>
> (e) at a discount not greater than a maximum discount specified by the dealer or established by agreement,

whether such markup or discount or minimum markup or maximum discount is expressed as a percentage or otherwise.

(3) No dealer shall refuse to sell or supply an article or commodity to any other person for the reason that such other person

(a) has refused to resell or to offer for resale the article or commodity

(i) at a price specified by the dealer or established by agreement,

(ii) at a price not less than a minimum price specified by the dealer or established by agreement,

(iii) at a markup or discount specified by the dealer or established by agreement,

(iv) at a markup not less than a minimum markup specified by the dealer or established by agreement, or

(v) at a discount not greater than a maximum discount specified by the dealer or established by agreement, or

(b) has resold or offered to resell the article or commodity

(i) at a price less than a price or minimum price specified by the dealer or established by agreement,

(ii) at a markup less than a markup or minimum markup specified by the dealer or established by agreement, or

(iii) at a discount greater than a discount or maximum discount specified by the dealer or established by agreement.

(4) Every person who violates subsection two or three is guilty of an indictable offence and is liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding two years or to both."

This new section of the Combines Investigation Act forbids a manufacturer or other supplier from requiring or inducing or attempting to require or induce, directly or indirectly, any other person to resell an article at a specified price or at not less than a minimum price, and makes it unlawful for a supplier to refuse to sell or supply any article or commodity to any other person for the reason that such person has resold or offered to resell the article or commodity at less than a price specified by the supplier or has refused to resell or offer for resale the commodity at not less than a specified price.

2. Interpretation of Legislation

In the instant case the allegations refer to an attempt to require or induce the three service station operators to sell B.A. 88 gasoline at a price specified by The British American Oil Company Limited, or at a price not less than a minimum price specified by the said Company.

It is contended on behalf of The British American Oil Company Limited that the Company did not specify a retail selling price or a minimum selling price for its gasoline and that its representative informed the service station operators that they were free to resell B.A. 88 gasoline at whatever price they chose. There is no evidence that the granting of the temporary competitive allowance by the Company was dependent upon the resale of gasoline at not less than a specified minimum price. The actions of the Company in question are related entirely to the efforts to secure the removal of price signs advertising gasoline at a price one cent per gallon lower than the prevailing price.

The only case to date in which the provisions of Section 34 have been interpreted by the courts in an intensive manner is Regina v. Moffats Limited, in which judgment was given by the Ontario Court of Appeal on January 9, 1957. In that case it was also contended that the retailer was left free to resell the commodities or articles at any price he chose. The judgment of the Court stated:

> "It is contended that since George's Appliances Limited was left at liberty to resell the commodities or articles advertised by it under the co-operative plan at any price which it deemed desirable, it was established that the appellant had no intention of inducing this company to resell at the price level mentioned in the advertisement. The appellant it is said, did not cause any investigation to be made to determine if sales were being made at the advertised prices or below that level as its sole purpose was to preserve a harmonious relationship with its dealers;

that if goods were advertised at a low price level a customer who had purchased a similar article at a higher price would complain to the dealer from whom he had bought that article, or the dealer would experience sales resistance if prospective customers were made aware of the availability of similar commodities manufactured by Moffats for a lower price at another outlet. It was forcibly argued that because of the detrimental effect of advertising of the nature described on its business relations with its dealer associates, the appellant was concerned only with the prices appearing in published advertisements and that it had no concern beyond that." (1)

The Court held:

"As to the first three grounds of appeal advanced before us, namely that the act of the appellant which is said to constitute the offence was directed to inducing dealers to do no more than advertise for sale and not to resell at less than specified minimum prices and that s. 34 did not extend to such a case, the simple and conclusive answer to that contention is that if an agreement binding a person to advertise commodities for sale at not less than specific designated prices causes such persons to resell such commodities at not less than that price, or has the effect of exerting an influence upon or creating an inducement to such persons to resell such commodities at not less than the price so designated, then the agreement assuredly falls within the prohibition of that section. It makes no difference whether this is a direct or indirect result of the operation of the scheme. The learned Magistrate was clearly convinced that the agreement did have that effect so far as the dealings between the appellant and George's Appliances Limited were concerned. His conviction was supported by the evidence, and I am wholly in agreement with it. The language used in s. 34, reasonably interpreted, clearly covers the acts of the accused corporation without the suggested addition of the words 'or offer for resale', which, in the circumstances, would be surplusage." (2)

It is the fact that in the Moffat case the supplier specified the price at which the goods were to be advertised by naming a specific price for each article for purposes of advertising. It will be noted that the Court found that an arrangement came within the terms of this Section if it "has the effect of exerting an influence upon or creating an inducement to such persons to resell such commodities at not less than the price so designed."

(1) [1957] O.R. 97.
(2) [1957] O.R. 105.

3. Natural Effect of the Action Taken by The British American Oil Company Limited

It was submitted by counsel on behalf of The British American Oil Company Limited that the retail price of gasoline had become stabilized by purely competitive forces at 39.9 cents per gallon on or about July 20, 1959. It was further submitted that the temporary competitive allowance of 1.9 cents per gallon was paid to the retailer if the gasoline were resold by the retailer at 39.9 cents per gallon or less than that. It must be concluded from the evidence, as these submissions indicate, that at the relevant time 39.9 cents was recognized generally in the gasoline trade as the current prevailing price.

The evidence is also to the effect, and particularly with respect to the three service station operators in the present inquiry, that the only practical means of selling gasoline at a lower price than that generally prevailing in sufficient volume to warrant a price reduction is by employing price signs and that price signs were used only in such circumstances. In other words, price signs were used to advertise a reduction in price and not a prevailing price. Other forms of advertising, such as hand-bills, newspapers and radio, do not appear to offer a practical means of conveying notice of a price reduction in gasoline to the motoring public. The situation appears to be much the same in the United States.(1)

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(1) "Defense counsel has said that there was no proscription on radio or newspaper advertising or anything other than price advertising at the station. And this is true. But the very fact that there was no evidence that any filling station operator ever used these other media of advertising of gasoline shows that, as a practical matter, that kind of advertising was, or is, of no value to the individual operator who largely depends upon those drivers who are near the station when they are in need of gasoline for the bulk of his trade. The sign at the station is what brings more business into the station, as the evidence in this case shows. The prohibition of signs, according to the evidence, stifles competition and tends to stabilize the retail price of gasoline." (Swygert, District Judge, United States District Court for the Northern District of Indiana, Hammond Division. CCH TRADE REGULATION REPORTS ¶ 69,596.)

If The British American Oil Company Limited had succeeded in inducing Messrs. Jack Halpert, Max Halpert and R. de Pass to remove the price signs which they had posted on July 24, 1959 it would have had the result of influencing these retailers to change their selling price of gasoline from 38.9 cents to 39.9 cents, the price recognized by The British American Oil Company Limited as the maximum price for which the temporary competitive allowance would be granted. From the viewpoint of Messrs. Jack Halpert, Max Halpert and R. de Pass the maximum price regognized by the Company became, in effect, a minimum price because they were deprived of practical means of establishing a lower price for the purpose of attracting more trade.(1) This was the situation even though the advantage of the retailers in advertising a lower price might have been short-lived because competing retailers would have met the reduced price very quickly.

4. Conclusion

The reason given by The British American Oil Company Limited for taking steps to secure the removal of price signs was that the signs detracted from the dignity and attractiveness of its service stations and were considered degrading. It is a fact that the Company took no objection to price signs at its service stations during the period of the "price wars". The evidence is also to the effect that the Company took no objection to signs on the premises of one or more of the service stations operated by Messrs. J. Halpert, M. Halpert and R. de Pass advertising products or services other than the price of gasoline. It would appear, therefore, that the Company took objection only to the posting of a price sign during a period when it regarded the price of gasoline as being stabilized.

In Regina v. Moffats Limited Senior Magistrate Elmore came to the following conclusion, which was concurred in by the Ontario Court of Appeal:

> "I cannot think that an inducement to advertise for sale at a higher price is not some inducement to sell at a higher price. Nor do I think that such inducement loses its effect because the accused may have only intended to accomplish another purpose." (2)

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(1) The fact that a maximum price may, in practice, operate as a fixed price or a minimum price was pointed out by the Restrictive Practices Court of Great Britain in Re Federation of Wholesale and Multiple Bakers (1959).

(2) [1957] O.R. 104-06.

In the instant case it was contended that The British American Oil Company Limited has a perfect right to insist that its stations shall be attractive and dignified and for this purpose to take steps to see that unauthorized signs, including price signs, are removed from its stations. If an agreement not to advertise by means of price signs has the effect of exerting an influence upon or creating an inducement to the service station operators affected by the agreement to resell gasoline at not less than the maximum price upon which a temporary competitive allowance will be paid, the agreement, in our opinion, falls within the prohibition of Section 34. While The British American Oil Company Limited took no objection to price signs at its service stations during the period of price wars, the Company on this occasion took immediate steps to enforce the agreement regarding unauthorized signs when price signs advertising a reduction in the price of gasoline of one cent were posted at the service stations involved in the present inquiry. In the circumstances disclosed in this inquiry the Company's attempts to secure the removal of price signs must be regarded as an attempt to induce the service station operators to resell gasoline at the prevailing price which was recognized by the Company and the retailers. It is the opinion of the Commission that the Company's actions exerted an influence upon or created an inducement to the service station operators to resell gasoline at not less than the price so designated and thus were contrary to Section 34.

(Signed) C. R. Smith
Chairman

(Signed) A. S. Whitely
Member

Ottawa,
February 25, 1960